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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-227

No. ~~770~~

YI AU LAU and LAM SAI TING,

Petitioners,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	20

CITATIONS

Cases:

Abel v. United States, 362 U.S. 217 (1959) 11, 12, 13

Brinegar v. United States, 338 U.S. 160 (1949) 13

Bumper v. North Carolina, 319 U.S. 543 (1968) 11

Camara v. Municipal Court, 387 U. S. 523 (1967) 11, 16

Carroll v. United States, 267 U.S. 132 (1925) 17

Colonnade Catering Co. v. United States, 397 U.S. 60 (1969) . 11, 16

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 17

Hirabayashi v. United States, 320 U.S. 81 (1942) 15

Japanese Immigrant Case, 189 U.S. 86 (1902) 12

Johnson v. United States, 333 U.S. 10 (1948) 16, 19

Johnson v. Zerbst, 304 U.S. 458 (1938) 11, 19

Korematsu v. United States, 323 U.S. 214 (1944) 15

McDonald v. United States, 335 U.S. 451 (1948) 16

Miranda v. Arizona, 384 U.S. 430 (1966) 12

Morales v. New York, 396 U.S. 102 (1969) 12

Ng Fung Ho v. White, 259 U.S. 276 (1922) 12

Peters v. New York, 392 U.S. 40 (1968) 2, 18

Quon Quon Poy v. Johnson, 273 U.S. 352 (1927) 12

Rios v. United States, 364 U.S. 253 (1960) 14

See v. City of Seattle, 387 U.S. 541 (1967) 11, 16

Sibron v. New York, 392 U.S. 40 (1968) 12, 14

Stanford v. Texas, 379 U.S. 476 (1965) 14

Stoner v. California, 376 U.S. 483 (1964) 11

Terry v. Ohio, 392 U.S. 1 (1968) 11, 12, 13, 14, 16, 18

Truax v. Raich, 239 U.S. 32 (1915) 15

United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970), cert. granted, 401 U.S. 936 ..... 10, 11, 12

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 19

Warden v. Hayden, 387 U.S. 294 (1967) 16

Wong Wing v. United States, 163 U.S. 228 (1896) 12, 16, 18

Woodby v. Immigration & Naturalization Service, 385 U.S. 276 (1966) 2, 11, 19, 20

Yam Sang Kwai v. Immigration & Naturalization Service, 133 U.S. App. D.C. 369, 411 F.2d 683 (1969), cert. denied, 397 U.S. 877 (1970) 10, 15

Statutes:

Immigration and Nationality Act, Section 287, 8 U.S.C. 1357 ..... 3, 14

Immigration and Nationality Act, Section 106(a)(4), 8 U.S.C. 1105(a)(4) 3, 19

Miscellaneous:

Annual Report, INS, 1969, Table 34, p. 102 13

New York Times, March 12, 1971, p. 33, Col. 5 ..... 10, 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which sustained final orders of deportation of the Board of Immigration Appeals.

OPINION BELOW

The opinion of the Court of Appeals was rendered on March 19, 1971 and is unreported. The opinion is set forth in Appendix A, pp. 1a-16a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1971, Appendix 17a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is constitutionally proper for Immigration & Naturalization Service officers to make an investigative "seizure" upon less than probable cause for the purposes of "interrogation"?

2. Whether INS officers may, without warrants, enter a restaurant for the purpose of conducting a search for aliens illegally in the United States based upon an informant's tip that aliens are illegally working in the restaurant?

3. Whether in absence of specific knowledge relating a suspect to evidence of crime, *Peters v. New York*, 392 U.S. 40 (1968), authorises "reasonable suspicion" as a basis to detain fleeing persons for interrogation?

4. Whether in a deportation proceeding, the clear, unequivocal and convincing evidence rule required by *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276 (1966), applies to proof of consent to search a place of employment, where such search results in evidence which establishes deportability?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides in part:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly, describing the place to be searched and the persons or things to be seized."

Section 287 of the Immigration and Nationality Act, 8 U.S.C. 1357, provides in part:

> "Sec. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States[.]"

Section 106(a)(4) of the Immigration and Nationality Act [8 U.S.C. 1105(a)(4)] provides in part:

> ". . . except as provided in Clause B of paragraph 5 of this subsection [nationality issues] the petition [for review of final orders of deportation] shall be determined upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

STATEMENT

On October 31, 1967, the Immigration & Naturalization Service* received an informant's tip that Chinese persons, not otherwise identified, were working at Trader Vic's Restaurant in Washington, D.C. Based upon this information, eight or nine INS officers went to the restaurant at approximately 5:30 p.m. on the same day. Officers were stationed at each of the exits, including those leading to various corridors within the Statler Hotel where Trader Vic's is located. Three officers entered the restaurant through its front entrance and approached the reception desk. (R 229, 195, 66, 67)

There is a conflict in the testimony as to what happened next. At the initial hearing, Burns testified that he "spoke with the maitre d' at the main desk . . . showed him (his) credentials . . . (and) . . . explained to him that that we had some information that there were some aliens who were employed in the establishment in illegal status and asked him if we could check the restaurant to ascertain whether our information was correct", and that the maitre d' gave him "permission to do so". (R. 228, 229)

The "maitre d'", identified as the assistant manager, testified that it was an Officer Podrasky who conducted the conversation with him, not Burns. His testimony is:

> "Q. Were you present at a time when officers from the Immigration and Naturalization Service came into the restaurant?
>
> A. That's right. I was the first one who was talking to them.
>
> Q. Do you know the names of any of the officers of the Immigration and Naturalization Service who came?
>
> A. I didn't exactly remember the name. I knew him because I had a chance of meeting him on a few

*Hereafter referred to as INS.

occasions. Mr. Podrasky, right now I remember. At the moment I didn't remember. I recognize his face, but I wasn't quite sure whether he was from the Immigration office or some other place because we see so many people there at Trader Vic's.

* * * * *

Q. How many officers were there, came into your restaurant at that time?

A. Through the front door there came in three of them. Three of the gentlemen came in.

Q. To your knowledge were any Immigration Inspectors at any other doors or exits to the restaurant?

A. Later I found out that they were coming from the employee's entrance through the back door of the kitchens.

Q. Do you know how many inspectors were at the back door?

A. I didn't exactly have a chance to count them because they were all over at the locker room. They were at the kitchen and they were at the dining room. I should say at least five or six of them.

Q. Did you have a conversation with Mr. Podrasky or any other officer from the Immigration Service when they came into the restaurant?

A. Yes, I did.

Q. Will you tell us what was said by Immigration Service Officers in that conversation?

A. Mr. Podrasky came in. Mr. Podrasky told me that you know where I am from, and I said, of course. You know our nature of business, the recognition of the customer is so important. Of course sometimes we don't know the people. We have to sort of more like pretend that we know them. This is more like a business thing. Anyway I know him so of course I told him, 'I know you', but I didn't mention his name because I forgot all about it and then I was on the phone, the phone

was ringing and while I was on the phone, he said, 'I am from the Immigration Office. I have to go into the restaurant and see your people.' He said, 'I have to question your employees', or something like that.

Q. What did you say to him?

A. I said, 'Just one minute until I hang up the phone'. Soon as I hung up the phone, he was just going right in the dining room.

Q. And did you stop him in the dining room?

A. Yes, I just dashed and I offered him, 'What I'm going to do, I'm going to reserve a small table in the dining room so that who ever you wish to see, I'll get him over to talk to you'. But he didn't, well I'm sure he heard it because I was close enough range for him to listen, but he went just right for the kitchen. One of the waiters was setting up the tables and one of the gentlemen went to see that particular waiter that was setting up and two others went right in the kitchen.

* * * * *

Q. Did any other officer of the Immigration and Naturalization Service ask your permission to go into the kitchen or to speak to the employees of Trader Vic's?

A. They didn't ask me any questions.

Q. Did Mr. Podrasky ask your permission to go into the kitchen or anywhere?

A. I should say rather, he didn't ask any questions, he just told me that he had to be doing this and he just went right through. He didn't wait for my permission or yes or no.

Q. Did Mr. Podrasky exhibit to you any identification showing that he was from the Immigration and Naturalization Service?

A. No, he did not show me any ID card.

Q. Did he show you any paper which appeared to be a warrant or any other document authorizing him to search the kitchen?

A. He did not show me any papers.

Q. Did you follow Mr. Podrasky into the kitchen of the. . .?

A. Yes.

Q. What took place in the kitchen?

A. The first thing he saw, the first man he saw was the bartender there, and he was asking what his name was and what is his situation status was and so on. He was questioning, and then the other gentleman was going right through the kitchen. Our kitchen is so situated that the first thing you go to the kitchen there is a bar and then all other cooks and chefs and dishwashers are located on the other side. They are around." (R. 194-197)

The manager of the kitchen testified that "about six or eight" Immigration officers came through the back entrance into the kitchen without permission and without showing any warrant, that there six employees in the kitchen at that time, that it "caused a little confusion", that the Immigration Inspectors grabbed (some of them) by the arm and took them on down (to the locker room)." (R. 104-107)

At a subsequent hearing, held upon remand from an earlier appeal to the Board of Immigration Appeals,[1] Podrasky corroborated Mr. Parks' testimony that it was he who

[1] Following the initial hearing and entry of orders of deportation by the Special Inquiry Officer, the Board of Immigration Appeals vacated the orders finding, inter alia, that "The record is a confusing one. There appears to be a conflict as to the manner in which the Service officials investigated the employees of the restaurant where respondents were allegedly found. For example, Burns testified it was he who asked the manager for permission to enter (pp. 20-1); the latter testified that it was Podrasky who approached him (pp. 40-1). Moreover, the manager indicated that Podrasky entered the kitchen of the restaurant without his permission." (R. 162).

was in charge of the detail. He testified "as we entered the establishment. . . I came into contact with an Oriental individual." He stated that he identified himself by showing his credentials and then asked "if we could check the help in the restaurant", and that he was told that he could, and that he was "led (by the 'Oriental individual') with the other two investigators into the kitchen". (R. 111-112)

Whether with or without consent, Podrasky, Burns and Officer Taylor, proceeded to question all of the employees on the premises and moved on through the restaurant toward the kitchen. As they walked, Burns observed a Chinese person in kitchen garb, running toward the front door of the restaurant. Burns ran after him, stopped him and asked the man to return to the kitchen with him. The man submitted to Burn's request. This was Yim Tsz Ki. (R. 228-229), whose case has become moot since he has become a lawful permanent resident.[2]

While returning Yim to the kitchen, Burns saw another Chinese person, also wearing kitchen clothes, going toward the front door. Burns stopped this man, who turned out to be petitioner Lam Sai Ting, and all three—Burns, Yim, and Lam proceeded toward the kitchen. (R. 71) On the way to the kitchen, Lam bolted from Investigator Burn's custody and started through a side-door of the restaurant. He was immediately grabbed by Officer Lamoreaux, who was stationed in the hotel hallway. (R. 78, 86). Meanwhile, Podrasky and Taylor had entered the kitchen and begun questioning Chinese employees. Two kitchen workers dropped the food that they were preparing and ran through a rear exit. Taylor ran after them. He managed to catch up with one of the men, grabbed him by the arm, and returned the man to the kitchen. This man was petitioner Au Yi Lau. The other man was not caught. (R. 46, 47).

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[2]Following the decision of the Court of Appeals, Yim departed the United States and was thereafter readmitted as an immigrant. See Motion to Vacate Judgment as to Yim Tsz Ki, No. 23,339, below.

All three men were taken to the locker room for questioning. The record is unclear as to whether the INS officers searched petitioners' lockers or went through petitioners' pockets. In any event, the INS seized seamens' documents from petitioners. (R. 53-60) The petitioners were then transported in the custody of the INS officers to INS headquarters for further questioning through interpreters. The petitioners were fingerprinted and signed statements were taken from them. (R. 232, 72, 73, 90) At petitioners' deportation hearing, the INS offered into evidence their seamens' documents, their fingerprints and their signed statements to show their identity and more important, their deportability. These items were accepted into evidence by the Special Inquiry Officer over the objection of petitioners' counsel, who contended that these items of evidence were the fruits of an illegal arrest, and therefore, inadmissible as evidence against petitioners. (R. 162, 165-166, 168, 183-184, 192, 210) The Special Inquiry Officer found the three petitioners in the case deportable upon findings that "an investigator requested and received permission to search the premises of the restaurant where (petitioners) were apprehended; that each of the (petitioners) was apprehended after behavior which gave the investigator reasonable cause to believe that the (petitioner) was in the United States illegally; and that there is sufficient evidence in the record to establish alienage and deportability". (R. 34-36) The Board of Immigration Appeals affirmed the decision, holding, in the context of a claim that there must be "clear convincing and unequivocal evidence" that permission was granted for the search of the kitchen, that such permission was granted; that, in any event, the arrested employees were stopped in other places as they fled from the kitchen; and that the evidence obtained from the petitioners derived from a lawful arrest and was sufficient to sustain deportability. (R. 3-13)

The District of Columbia Circuit, in reviewing the deportation orders pursuant to 8 U.S.C. 1105(a), held that there is "adequate support in the record" for the finding that permission was granted to search the kitchen; that it was

therefore "concluded by it"; that the deportation orders do not "derive from tainted evidence" because "probable cause to arrest (the petitioners) without warrant(s) . . . had come into being" following "forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest . . ." (App. 11a). The court held the deportation orders valid.

REASONS FOR GRANTING THE WRIT

The case here involves the conduct of "area control searches",[2a] without warrants, by the Immigration and Naturalization Service to detect aliens illegally in the United States. As developed in the record below and as described generally (See *New York Times,* March 12, 1971, p. 33, Col. 5.:

> "Immigration officers enter the restaurant during business hours, blocking the front and rear entrances. While one of them identifies himself to the proprietor, his partner heads straight for the kitchen, where he asks every employee for his passport or other immigration document. The officers also search basements and bathrooms".

The District of Columbia Circuit has sustained this practice as it affected the petitioners here and has in effect given carte blanche to the Immigration and Naturalization Service to continue to conduct what is, in the words of the author of the opinion below,[3] a "dragnet detention for investigation".

[2a] See *United States v. Campos-Serrano,* No. 1028, Supreme Court of the United States, October Term, 1970, Brief for the United States, page 3: ". . . a number of agents of the Immigration and Naturalization Service (INS) conducted an investigation in an area of Chicago where it was suspected that aliens unlawfully in the United States were working . . . . They arrested some fifteen or sixteen aliens. . ."

[3] *Yam Sang Kwai v. INS,* 133 U.S. App. D.C. 369, 374, 411 F.2d 683, 688 (1969), *cert. denied,* 396 U.S. 877 (1970).

In literally classic terms, the central question here is the "right of the people"—including "aliens and persons believed to be aliens" to be secure in their person from unreasonable seizures at their places of work.

The decision and the record below present a mosaic of issues with constitutional dimensions in areas which require resolution by this Court: the propriety of "forcible detentions of a temporary nature for the purposes of interrogation" (App. 11a); Cf. *Terry v. Ohio*, 392 U.S. 1 fn. 16 (1968), the rights of aliens in their confrontations with arresting officers of the Immigration and Naturalization Service; See *Abel v. United States*, 362 U.S. 217 (1959) and *United States v. Campos-Serrano*, 430 F.2d 173, (7th Cir. 1970); *cert. granted*, 401 U.S. 936, Petition No. 1028, October Term, 1970; the use of warrantless administrative searches of commercial premises upon the sole basis of an "informant's tip"; Cf. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967) and *Colonnade Catering Co. v. United States*, 397 U.S. 60 (1969); the evidentiary standard for determining "consent" to the search. See *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Stoner v. California*, 376 U.S. 483 (1964); and *Bumper v. North Carolina*, 319 U.S. 543 (1968); and the weight of evidence required in deportation proceedings to establish such "consent". Cf. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966).

In view of the fact that this Court is presently considering the closely-related question of the right of aliens to receive *Miranda* warnings from INS officers, it would be especially timely for the Court to review the issues here. See *United States v. Campos-Serrano*, 401 U.S. 936 (1970), Petition No. 1028, October Term, 1970.

I

I. The ruling below goes beyond the decisions of this Court in *Terry v. Ohio*, 392 U.S. 1 (1968),[4] and *Sibron v. New York*, 392 U.S. 40 (1968), in holding that an "immigration officer may detain an individual, reasonably believed to be an alien, against his will for questioning". See *Morales v. New York*, 396 U.S. 102 (1969).

Like *Terry*, which involved the "confrontation on the street between the citizen and the policeman investigating suspicious circumstances" (392 U.S. at 4), the holding of the District of Columbia Circuit presents "serious questions concerning the role of the Fourth Amendment in the confrontation on the street" (See *Tit Tit Wong, et al v. United States Immigration and Naturalization Service*, Petition for Writ of Certiorari pending), and in his place of work, between "persons believed to be aliens" and federal law enforcement officers.

Although this Court has at various times passed upon the constitutional claims of aliens, (See *e.g., Wong Wing v. United States*, 163 U.S. 228 (1896); and *Japanese Immigrant Case*, 189 U.S. 86 (1902)) and "persons believed to be aliens", (See, *e.g. Quon Quon Poy v. Johnson*, 273 U.S. 352 (1927); and *Ng Fung Ho v. White*, 259 U.S. 276 (1922), it has never directed its attention to the arresting procedures of the Immigration and Naturalization Service. See *Abel v. United States*, 362 U.S. 217 (1959). But see also *United States v. Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970), *cert. granted*, 401 U.S. 936 (1970) in which the issue of the rights afforded to aliens by *Miranda v. Arizona*, 384 U.S. 430 (1966) is before this Court.

These procedures are of stark importance not only to aliens who may be illegally in the United States, but to those who are lawful permanent residents (in 1969, there were approximately 4 million permanent resident aliens.

[4] See Footnote 16: "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or 'interrogation.'" 392 U.S. at 20.

See Annual Report, INS, 1969, Table 34, p. 102), as well as to the countless persons in the United States who may be "believed to be aliens".[5]

As stated in the dissenting opinion of Mr. Justice Brennan in *Abel v. United States*, 362 U.S. at 252:

> "These arrest procedures . . . differ as night from day the processes of an arrest for crime. When the power to make a broad, warrantless search is added to them, we create a complete concentration of power in executive officers over the person and effects of the individual. We completely remove any independent control over the powers of executive officers to make searches. They may take any man they think to be a deportable alien into their own custody, hold him without arraignment or bond, and having been careful to apprehend him at home, make a search generally through his premises".

The need to review the ruling below is made more compelling because the lower court essayed to apply this Court's ruling in *Terry*, without noting that the question it decided was explicitly reserved. (App. 11a)

In its opinion, the court expressly, indeed solely, relying upon *Terry*, held:

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[5]The record here establishes that INS officers questioned more employees on the premises than were arrested (R. 104-7, 194-7) and who were therefore presumably citizens or aliens legally in the United States. See dissenting opinion, Mr. Justice Jackson, *Brinegar v. United States*, 338 U.S. 160, 181-182 (1949) in which he observed:

> "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."

> "...that immigration officers ... may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country". (App. 11a).

Emanating from the District of Columbia Circuit and affirming an administrative decision by the Board of Immigration Appeals,[6] this holding, unless reviewed by this Court, will serve as a judicial imprimatur, supported by *Terry*, for the continuation of conduct by Immigration officers which gives to aliens and persons believed to be aliens treatment which is different from that accorded to citizens and persons believed to be citizens.

Inasmuch as "aliens in this country are sheltered by the Fourth Amendment in common with citizens" (App. 10a) a review of the decision below is warranted in order to determine whether there may be differential standards for aliens and persons believed to be aliens.

II

II. The premises of the ruling below also warrant review in the light of the repeated decisions of this Court regarding warrantless searches.

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[6]The Board held here that under 8 U.S.C. 1357(a)(1) "it would appear that no independent evidence of alienage is needed to approach a person. If independent evidence is needed, it can be found in the reasonable suspicion that a person is an alien. *A suspicion can be a reasonable one if no more appears than that the person approached is in an area in which illegal aliens are found*". (App. 25a) (Italics supplied). This administrative holding by a board, acting under the authority of the Attorney General and controlling the Immigration and Naturalization Service, (See 8 C.F.C. 31) appears plainly in conflict with the decisions of this Court. See *Rios v. United States*, 364 U.S. 253 (1960) and *Sibron v. N.Y.*, 392 U.S. 40 (1968). In effect, it permits Immigration officers to make warrantless searches of premises in a manner which would be unconstitutional "under the unbridled authority of a general warrant". See *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

Relying upon its own previous decision in *Yam Sang Kwai v. INS*, 133 U.S. App. D.C. 369, 411 F.2d 683 (1969), *cert. denied*, 396 U.S. 877 (1970),[7] the District of Columbia Circuit "insulate(d) from illegality the steps taken by the immigration officers in proceeding upon the informant's tip to the restaurant in question and in making the initial dispositions of their forces that they did". (App. 11a). It explained that *Yam Sang Kwai's* "rationale . . . was that the minimal invasion of the privacy of the individual approached for questioning was justified by the special needs of immigration officials to make such interrogations" (App. 10a).

Those "special needs" were based upon the "practical considerations" urged by the Immigration and Naturalization Service: "First, the number of individuals seeking to enter this country illegally is quite high, and the number who succeed in this venture has rapidly increased with each passing year; and second, the ability to gather proof against these illegal entrants independent of a reasonable opportunity for interrogation is exceedingly difficult". (App. 9a).

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[7] In *Yam Sang Kwai*, Judge McGowan, the author of the court's opinion here (App. 2a), stated in his concurring opinion: "The evils of dragnet detention for investigation in any area of law enforcement are always a legitimate area of judicial concern" and agreed that "the 'routine search' characterization used by the Government could certainly stand some ventilation" but saved his concern for the "case of one who has clearly been detained against his will". 411 F.2d 683, 688. Foreshadowing his position here, where the petitioners were detained against their will, Judge McGowan stated that the "constitutional issues involve the balancing of interests in privacy with the needs of law enforcement" and suggested that "law enforcement authorities (may) have no way of proceeding effectively except by the direct inquiry approach to those who reasonably appear to be aliens". This is an approach, which upon the record here (R. 230, 67-68, 46-47, 53-60), makes distinctions between those persons who appear to be "Oriental", "Chinese" and "Mongolian" and persons who have other racial characteristics, a distinction which is not only invidious but unconstitutional. *Truax v. Raich*, 239 U.S. 32, 41 (1915); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1942); *Korematsu v. United States*, 323 U.S. 214, 217 (1944).

These considerations seem wanting when weighed against the language of the Fourth Amendment and measured against the rulings of this Court which have repeatedly condemned and limited the use of warrantless searches.

Although the "need for effective law enforcement" has been indeed "balance(d) . . . against the right of privacy", *Johnson v. United States*, 333 U.S. 10, 14-15 (1948), the "balance" has never been achieved with such a dubious counterpoise as that relied upon below. The teachings of this Court have been that there must be gravity in the offense[8] involving "crimes of violence which endanger life and security", *McDonald v. United States*, 335 U.S. 451 (1948), concurring opinion, Jackson, J.; and *Terry v. Ohio*, 392 U.S. 1, 25-27 (1968); or "exigent circumstances" such as "hot pursuit", *Warden v. Hayden*, 387 U.S. 294, 298 (1967); or "emergency situations" which compel "prompt inspections", *Camara v. Municipal Court*, 387 U.S. 523, 539 (1966).

The decision below is plainly in conflict with *Camara*. There this Court rejected a proffered justification for a warrantless administrative search which urged, as is contended here, that the "only effective means of enforcing (fire, housing, and sanitation) codes is by routine systematized inspection of all physical structures." (387 U.S. at 533)

Apart from the issue of the warrantless administrative search is the protection to be accorded to a person in his place of employment in the light of *Camara v. Municipal Court*, 387 U.S. 523 (1966); *See v. City of Seattle*, 387 U.S. 541 (1966); and *Colonnade Catering Co. v. United States*, 397 U.S. 60 (1969).

The District of Columbia Circuit "insulates from illegality (App. 10a), the conduct of the Immigration and Naturalization Service, established on the record here (R. 81, 124), of

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[8]No criminal offense appears here in being, without more, an alien "illegally in the United States". See *Wong Wing v. United States*, 163 U.S. 228 (1896).

surrounding a restaurant upon the basis of an informant's tip giving information concededly not giving rise to probable cause, guarding every exit, then dispatching a team of investigators systematically to question every employee on the premises, and "forcibly detaining for purposes of interrogation" those persons whose behavior in this circumstance becomes "suspicious".

This Court has held, even with the lesser constitutional protection which automobiles appear to have, that prohibition agents may not "stop every automobile on the chance of finding liquor". *Carroll v. United States*, 267 U.S. 132, 154-155 (1925); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221.

The decision of the Court below thus has the anomalous effect of providing greater protection for the transient automobile rider than for a person at his fixed place of employment. This certainly seems out of harmony with the limited exception which this Court has applied in the automobile search cases.

The power of INS investigators to conduct "routine systematized inspection" of any "area in which illegal aliens are found" (App. 25a), while striking especially at restaurants specializing in Chinese cuisine (See, *New York Times*, March 12, 1971, p. 33, Col. 5), has an in terroram impact upon foreign-born people, including citizens and lawful permanent residents, wherever they may congregate. Because of the importance of the issue, the decision below merits review to determine specifically whether it is in harmony with *Camara*.

III

An additional issue of importance, one upon which the very structure of the ruling below is bottomed, is its concept of "reasonable suspicion" to "warrant . . . the temporary detention of petitioners for interrogation". (App. 12a).

Relying upon *Peters v. New York*, 392 U.S. 40, 66-67 (1968), the lower court held that the "efforts of petitioners to flee the premises" created "a reasonable suspicion in the minds of the officers that petitioners might be illegal aliens . . . ."

Peters seems less pertinent here than *Wong Sun v. United States*, 371 U.S. 471 (1963). For unlike the facts here, where there is no specific knowledge of the commission of any offense, the officer in *Peters* had "specific knowledge. . . relating the suspect to the evidence of crime" which was "coupled" with deliberately furtive actions and flight" to justify, not a "reasonable suspicion" but "probable cause to arrest . . .for attempted burglary". 392 U.S. at 66, 67.

Since the "neutral scrutiny of a judge" is required to "evaluate the reasonableness of a particular search or seizure" the standards which the judiciary uses are of critical importance. The court below took flight alone as the one "specific and articulable fact", *Terry v. Ohio*, 392 U.S. at 21, to justify the seizure of the petitioners, although no evidence appears of record that the INS officers were ever identified to them, and although it was the conduct of the INS officers in swarming into the kitchen which precipitated petitioners' flight.

In the context of the other significant issues raised by the decision below, it is urged that this Court should determine whether *Peters* or *Sun* provides a better standard for evaluating the seizure here.

IV

Further questions of substantial importance are raised by the District of Columbia Circuit's disposition of the petitioners' claim that search was made of their place of work without consent.

Woodby v. Immigration Service, 385 U.S. 276, 286 (1966), holds that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."

This holding does not, in terms, require that determinations regarding the admissibility of confessions and documents which are said to have been obtained as a result of an illegal arrest, be made under this evidentiary standard. Nonetheless, repeated decisions by this Court make it clear that waivers, as well as other constitutional protections, including those of the Fourth Amendment, cannot be presumed, *Johnson v. Zerbst*, 304 U.S. 458 (1938); or established by acquiescence to authority, *Johnson v. United States*, 333 U.S. 10 (1947). The District of Columbia Circuit itself has held that "waiver or consent must be proved by clear and positive testimony". 89 U.S. App. D.C. 64, 190 F.2d 649 (1951).

Despite these rulings, the court below held that its "review is circumscribed by the Congressional commands that it be limited to the administrative record and that findings of fact therein be taken as conclusive 'if supported by reasonable, substantial and probative evidence on the record considered as a whole.' 8 U.S.C. 1105(a)" (App. 2a). Citing the statutory provision and *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the court ruled that the finding that INS officers were given permission to search the premises "has adequate support in the record, and we are concluded by it."[9]

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[9]While there is conflicting testimony regarding whether permission was granted to the three INS Officers who presented themselves at the front entrance to the restaurant, no contention has been made and no evidence appears that the "six or eight" officers who came through the back entrance directly into the kitchen (R. 104-107) were given permission to make their search.

The District of Columbia Circuit made the very error which this Court pointed out in *Woodby* in confusing its role in determining its "scope of judicial review" with a determination of the "burden of proof" required prove consent to enter the premises. See *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 282 (1966).

Clearly, the conflict in testimony between the immigration officers as to who obtained consent for the search, the positive testimony of the restaurant manager that no consent was given to the three officers who came through the front door, and the absence of any consent for the six or eight officers who came through the back door—do not add up to "clear, unequivocal, and convincing evidence" that consent was granted.

The failure of the court below to give effect to *Woodby* and the issue whether the "clear, unequivocal, and convincing evidence" rule should apply to Fourth Amendment claims is, apart from the other questions posed by the decision below, one which warrants consideration by this Court.

CONCLUSION

For the reasons urged above, petitioners urge that a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

DAVID CARLINER
Attorney for Petitioners

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,339

AU YI LAU, YIM TSZ KI, LAM SAI TING
PETITIONERS

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

No. 23,527

TIT TIT WONG and NEI NGAN CHAN, PETITIONERS

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Petition to Review Deportation Order of
Board of Immigration Appeals

Decided March 19, 1971

Mr. David Carliner for petitioners.

Mr. Charles Gordon, General Counsel, Immigration and Naturalization Service, of the bar of the Supreme Court of the United States, *pro hac vice,* by special leave of the court, with whom *Messrs. Thomas A. Flannery,* United States Attorney, and *John A. Terry,* Assistant United States Attorney, were on the brief, for respondent. *Mr. Paul C. Summitt,* Attorney, Department of Justice, also entered an appearance for respondent.

Before: FAHY, *Senior Circuit Judge,* McGOWAN and LEVENTHAL, *Circuit Judges.*

McGOWAN, *Circuit Judge:* These two statutory review proceedings, although not consolidated in this court, were argued together and are suitable for disposition by one opinion. They involve deportation orders issued, after evidentiary hearings, by a Special Inquiry Officer of the Immigration and Naturalization Service (INS), which were affirmed by the Board of Immigration Appeals. Our review is circumscribed by the Congressional commands that it be limited to the administrative record, and that findings of fact therein be taken as conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105(a). There is no issue in either case as to the adequacy of the evidence upon which the orders rest. The claim in each is, rather, that the evidence was the fruit of an illegal arrest. We look first to the factual circumstances from which each of these contentions derive.

I

No. 23,339

Petitioners in this case are three Chinese seamen who are charged with deserting their ships in American ports. On October 31, 1967, immigration officers at the Washing-

ton, D.C., field office received an informant's tip that aliens unlawfully in this country were working in a restaurant located in the downtown area which had been under periodic surveillance by the Washington immigration office for the preceding year. In response to this tip, some seven of the officers walked to the restaurant, which was a few blocks from their office. They had no warrants because they lacked information of the requisite degree of specificity.

Upon their arrival, some of the officers stationed themselves at the main exits of the restaurant. Three of the officers entered the restaurant by way of the front entrance, and spoke to the assistant manager who was in charge at the time. They identified themselves, told him the purpose of their visit, and asked his permission to enter the restaurant in order to talk to the employees. The assistant manager agreed to their coming into the resturant, but there was some disagreement as to whether he permitted them to conduct their investigations in the kitchen. The Board of Immigration Appeals accepted the finding of fact by the Special Inquiry Officer that the officers had received such an invitation.

As the officers proceeded towards the kitchen, they observed a person of Chinese extraction, dressed in a blue denim uniform, scurrying through the dining room to the main entrance door. One officer (Burns) followed him to the door, stopped him, identified himself as an immigration officer, and asked the individual, later identified as petitioner Yim, to accompany him to the kitchen. As the two headed back toward the kitchen, a second employee, petitioner Lam, also dressed in kitchen garb, was met by them as he appeared to be hurrying towards the front door. He was requested by Officer Burns to go to the kitchen for a talk. Lam did so momentarily, but suddenly darted through a side door, only to encounter Officer Lamoreaux who asked him if he was off a ship and received an affirmative answer. Petitioner Lam then was sent to the locker room to change

his clothes before being taken to the immigration office. When Officer Burns and petitioner Yim arrived in the locker room of the kitchen, Burns asked Yim if he had jumped a ship, to which Yim replied that he had.

During this time, two officers were questioning the employees in the kitchen, when two of the workers dropped their culinary utensils and darted out the rear door. One of the officers gave chase and halted one of the fleeing kitchen workers, later identified as petitioner Au. With the aid of another employee, who acted as interpreter, Au was questioned immediately by the officer who detained him, and admitted that he had "jumped" ship. The officer then took him to the locker room where they joined the other petitioners. All three petitioners were searched, and the officers seized seamens' documents from each petitioner which indicated that in fact they had overstayed their leave.

The three petitioners then accompanied the officers to the immigration office, where they awaited the arrival of an interpreter.[1] In the presence of the interpreter, sworn statements were taken from each of the three in which they admitted that they had come to this country as crewmen, and were illegally in the United States.[2]

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[1] The record reveals that petitioners were able to speak in broken English and therefore they were able to answer the simple questions of the detaining officers. However, it is clear that for the purposes of an affidavit an interpreter was needed.

[2] Before the interrogation began at the immigration office, each petitioner was, in accordance with INS policy, given the full *Miranda* warnings. Each stated that he did not wish counsel to be provided. There is no issue raised in this case as to the adequacy either of the warnings or the waiver. *Compare* United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970), *cert. granted* March 1, 1971, (*Miranda* warnings held necessary where, after one interrogation and exami-

No. 23,527

On November 7, 1967, petitioners Wong and Chan, persons of Chinese extraction, accompanied Mr. Wong's ailing brother to the Washington Hospital Center where the latter made application for medical treatment.[3] The receptionist at the hospital doubted the sick man's right to be in this country, and called the Washington immigration office. Officers Taylor and Reissig were dispatched to the hospital where, upon arrival, Officer Taylor went inside to question the sick man, and Officer Reissig remained in their government car by the front entrance.

Once inside the hospital, Officer Taylor went to a waiting room where he was to interrogate the applicant for medical assistance. However, when he identified himself to the receptionist as the immigration officer for whom the patient and the two other Chinese (see note 3 *supra*) men had been waiting, and started talking to the Chinese patient at the desk, he noticed that the two petitioners rose from their chairs and left the room. Officer Taylor testified that he thought there was something odd about their departure; accordingly, when he had concluded the task of interrogating the prospective patient—a questioning that lasted some fifteen minutes, resulting in the clearance of

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nation of an alien's identification papers, the immigration officers, having thereafter acquired some reason to believe that the alien was guilty of the crime of altering the papers, returned a second time to examine the papers without first giving the warnings). Similarly, since here the restaurant owner consented to the entry by INS agents we are not required to consider the disposition appropriate in a case of unconsented entry and a claim of illegality due to lack of search warrant.

[3] There were apparently two other men of Chinese extraction in the party, one of whom is identified in the record as Mr. Yee Kong Ling.

petitioner Wong's brother—he thought he "would make quiet inquiries" and see if he could find the two men who had left.

Officer Taylor advised his colleague he was interested in these two Chinese and intended to look for them in the hospital "so that he could talk to them." He then spent approximately fifteen minutes more searching several corridors and other waiting rooms in the hope of finding the two petitioners. He stepped out of a side door of the hospital onto a sidewalk, and spotted petitioners by the hospital parking lot, about half a block away. He saw them looking back, and when they saw him they quickened their pace on into the parking lot, and broke into a jog or "sort of dog trot," glancing back at Officer Taylor as they went.

For a while they got out of his field of vision, but then he saw them inside a car parked in the lot. As Taylor approached the car, one of the men, who was in the back seat, attempted to roll up the car windows and lock the car doors. The other was in the front seat, and tried to start the car. Due to what was described by Officer Taylor as a basic unfamiliarity with the vehicle, neither petitioner was successful at his task. Taylor then attempted to question them through an open window, but soon realized that there was an insurmountable language barrier. He decided to enlist the support of Officer Reissig. In order to insure that petitioners would not leave, Officer Taylor took their car keys and asked a nearby hospital guard to watch the car for a moment. Officer Taylor located Officer Reissig, and the two returned about five to seven minutes later, bringing their car to a halt in front of the one in which the two petitioners were seated.

Several more minutes elapsed while the two officers again tried unsuccessfully to communicate with the petitioners. At this point, they sought the aid of a passing Chinese stu-

dent, who agreed to act as an interpreter. The Chinese student began his interrogation under the supervision of Officer Reissig. In the meantime, Officer Taylor decided that it might be beneficial to return to the hospital to determine whether the other Chinese men in the building were related to petitioners. After a ten minute search, he found Mr. Ling, who was the owner of the car.

Mr. Ling agreed to accompany Taylor to the parking lot in order to identify the petitioners. Upon returning to the lot, Mr. Ling identified the petitioners as his friends, but refused to aid in their interrogation. However, at that time, Officer Reissig informed Officer Taylor that the Chinese student had discovered that the petitioners were in the country illegally. According to the findings of the Special Inquiry Officer, the student then left the scene of the interrogation.[4] The two officers then arrested petitioners, and transported them to the Washington headquarters. There, petitioners turned over to the investiga-

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[4] Petitioners requested that their hearing be reopened in order that they be allowed to show that the Chinese student never existed. This request was granted by the Special Inquiry Officer. Since petitioners had been instructed by their counsel to remain silent at the hearing, the only method which they could employ to prove the nonexistence of the student was to submit an affidavit by their friend, Mr. Ling. Mr. Ling attested to the fact that he did not see the student when he came to the car to identify petitioners. He further stated that petitioners also denied the existence of the student when they related the incident to him. Mr. Ling was called to the stand in order to be cross-examined by the Government.

Petitioners' counsel also hoped to disprove the existence of the student by pointing out at the hearing that the Government was unable to produce the student as a witness or even to produce the name and address of the student. However, the Board of Immigration Appeals affirmed the finding of the Special Inquiry Officer that there was, in fact, such a student. They based this finding on the testimony of Officers Taylor and Reissig, as well as the hospital policeman. Fur-

tors certain seamens' papers, and also made statements in response to interrogation. These statements were not, however, regarded by the Special Inquiry Officer as competent evidence because of what he found to be the failure of the interrogators to comply with INS regulations requiring advice of right to counsel.

II

At the hearings before the Special Inquiry Officer in both No. 23,339 and No. 23,527, petitioners were represented by counsel but, upon his advice, stood mute and presented no evidence. The claim made on their behalf there, as here, was that petitioners had been arrested without probable cause, and that the evidence offered by the Government against them was the forbidden fruit of these assertedly illegal arrests. In assessing these claims, any restraints upon the freedom of movement of petitioners must be viewed by reference to the statutory authority given immigration officers. There are two provisions of possible relevance, one being addressed to interrogation and the other to arrest, in each instance without warrant.[5]

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thermore, the Board of Immigration Appeals pointed out that the record gives some indication that the student may have left the scene before the arrival of Mr. Ling, thus making Ling's observations not necessarily inconsistent with that of the officers. We are, in this state of the record, without authority to reject this finding of fact.

[5] Both are contained in Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357, as follows:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view

We agree with the Government that the *arrest* provision must be read in light of constitutional standards, so that "reason to believe" must be considered the equivalent of probable cause. Moreover, the Government does not insist that in the matter before us each immigration officer did have probable cause to arrest when he first confronted each petitioner. It is urged that probable cause is needed only if a detention reaches the level of an arrest, and that the original encounters with petitioners were not arrests.

The Government focuses upon the *interrogation* provision of the Act as manifesting a Congressional purpose to permit immigration officers to make detentions for questioning which fall short of a full-blown arrest. It argues that such a reading of the statute is buttressed by two practical considerations: First, the number of individuals seeking to enter this country illegally is quite high, and the number who succeed in this venture has rapidly increased with each passing year; and, second, the ability to gather proof against these illegal entrants independent of a reasonable opportunity for interrogation is exceedingly difficult.

In *Yam Sang Kwai* v. *INS*, 133 U.S.App.D.C. 369, 411 F.2d 683 (1969), *cert. denied*, 396 U.S. 877 (1970), we viewed this provision (Section 287(a)(1)) as according,

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is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

* * * * *

at the least, to immigration officers the right to seek to interrogate individuals reasonably believed to be of alien origin. The underlying rationale of that decision was that the minimal invasion of the privacy of the individual approached for questioning was justified by the special needs of immigration officials to make such interrogations. This allowance for mere questioning, which assumes the individual's cooperation, is analogous to decisions which have contemplated the same scope of authority for police officers,[6] as well as for other administrative officials.[7]

We are in this instance, however, confronted with a question which the court did not have in *Yam Sang Kwai*, namely, whether the immigration officer may detain an individual, reasonably believed to be an alien, against his will for the purpose of questioning.[8] We believe the statutory interrogation authority comprehends such detentions, but, because they are far greater intrusions upon personal privacy than the nonforcible approaches, and since aliens in this country are sheltered by the Fourth Amendment in common with citizens, such a reading of the Congressional mandate must be controlled by the constitutional standards governing similar detentions made by other law enforcement officials. *See Terry* v. *Ohio*, 392 U.S. 1 (1968).

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[6] Green v. United States, 104 U.S.App.D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959).

[7] United States v. Grandi, 424 F.2d 399 (2nd Cir. 1970) (customs officials).

[8] In *Yam Sang Kwai*, the claim was that there had been an arrest without probable cause by reason of the fact that, unknown to the petitioner, immigration officers had been posted outside the building while another officer went inside to question petitioner. We held that no arrest had as yet occurred. Petitioner in that case, when approached for interrogation, cooperated voluntarily. The arrest was made only after the information elicited by questioning provided probable cause to believe that he was in the country illegally.

We hold that immigration officers, in accordance with the Congressional grant of authority found in Section 287 (a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. Utilizing the standards developed in *Terry*, such detentions are to be judged from case to case by reference to the particular facts of each. We proceed to this inquiry in the two cases immediately before us.

III

With respect to No. 23,339, we disallow the claim that the deportation orders derive from tainted evidence. Our recent decision in *Yam Sang Kwai, supra* p. 9, insulates from illegality the steps taken by the immigration officers in proceeding upon the informant's tip to the restaurant in question and in making the initial dispositions of their forces that they did. Their approach was orderly. They were at some pains not to disrupt the regular routine of the restaurant. The management official in charge was asked for authority to enter the restaurant and to conduct the questioning in the kitchen area.[9] Such disorderliness as occurred was the product solely of the efforts of petitioners to flee the premises.

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[9] The assistant manager's testimony was that he offered the officers a table in the restaurant at which they could question employees, but he admitted that he did not forbid them from going into the kitchen. The officers testified that his grant of permission on the latter score was explicit. The special inquiry officer found this last to be the fact, and his finding was accepted by the Board. We think the finding has adequate support in the record, and we are concluded by it. 8 U.S.C. § 1105(a)(4). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

It was this response to the appearance of the immigration officers which, we think, sufficed to create a reasonable suspicion in the minds of the officers that petitioners might be illegal aliens, and thereby, under the *Terry* doctrine, warranted the temporary detention of petitioners for interrogation.[10] In the case of petitioner Yim, indeed, it is not even clear that there was a detention against his will since, once accosted in his apparent progress towards the front door, he appears to have acquiesced readily in the request by Officer Burns to accompany him to the kitchen. Once there, he immediately said that he had jumped a ship. Petitioners Lam and Au manifested their purpose to flee in a more positive manner, and would have gotten away if they had not been affirmatively intercepted. They, thus, ended up in the kitchen under circumstances more nearly resembling forcible detention, although each had given the information that he was off a ship when initially intercepted and before he reached the kitchen.

In the case of all three, there had come into being, by the time they were foregathered in the kitchen, probable cause to arrest without warrant under Section 287(a)(2); and they were so arrested and taken to the Immigration

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[10] In United States v. Curtis, —— U.S.App.D.C. ——, 427 F.2d 630 (1970), we remarked *en banc* the relevance of flight at the appearance of the police to the reasonableness of a warrantless entry upon private premises for the purpose of arrest. We quoted the statement of the Supreme Court in Peters v. New York, 392 U.S. 40, 66-7 (1968), that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." If flight can contribute so greatly to probable cause for arrest, it certainly has the capacity in appropriate circumstances to generate the lesser degree of reasonable suspicion requisite for an investigatory stop.

Office. No claim is made here that anything improper occurred in their further interrogation there. The argument is, rather, that their arrests occurred simultaneously with the initial approach to them by the officers in the restaurant, and before the officers acquired knowledge constituting probable cause. We think that, at most, those confrontations involved temporary detentions for questioning which were authorized by Congress and which did not, on these facts, fall afoul of the Fourth Amendment.

IV

In No. 23,527, as noted hereinabove, the Government's case had to be made without the aid of the statements taken from petitioners Wong and Chan in the course of the investigation conducted at the Washington office following their arrest at the hospital parking lot. The Government now argues that, even if the arrests be deemed illegal, affirmance is in order because the documentary evidence introduced was sufficient to show illegal presence in the country by reason of petitioners having overstayed their limited shore leaves; and that these documents were of an official character and came into the Government's possession independently of the taking of petitioners into custody. The record, however, is in an abominably muddled state on this score, and we are unable to conclude from our examination of it that the Government's claim in this regard is well taken.[11] We look, then, to the merits of the claim of taint arising from illegal arrest.

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[11] What the Government itself terms a major item of evidence against petitioners, namely, the crewman's landing permit (which shows the date, place, and manner of admission into the country), appears to have been located as a direct result of the detention. In the case of petitioner Wong, the Government learned, after questioning him at the immigration office, that his permit was in the hands of Mr. Ling.

Therefore, the immigration officers called Mr. Ling and asked him to bring the document to the office, which he did. Petitioner Chan's permit was either seized from his person after he was arrested or was brought to the office by Mr. Ling after Chan was questioned.

The Government points out that the remainder of the This inquiry, of course, is the same as that we have pursued in No. 23,339. There is here no preliminary issue of the *Yam Sang Kwai* nature, since the errand upon which the two officers came to the hospital was undisputedly legitimate, *i.e.*, to check the status of the ailing Mr. Wong at the request of the hospital receiving authorities. When Officer Taylor arrived at the hospital, identified himself to the receptionist as an immigration officer, and began talking with the Chinese patient who was awaiting his arrival, his attention was struck by the fact that the two Chinese persons immediately got up from their seats in the waiting room and departed. He proceeded with his check of the sick man, but resolved to explore the suspicious circumstance further as soon as he had dispatched the business immediately at hand. That took only about 15 minutes, and then he started to look for the two who had left the waiting room. He had reasonable basis to believe they were aliens and to seek to question them.

We have recounted above Officer Taylor's search through the hospital corridors, his sight of petitioners when he came out the side door of the hospital, their hasty repairment to the auto on the parking lot when they saw him, and their unsuccessful efforts to lock the car against him and to drive away. When they appeared unable to respond

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documentary evidence (Hong Kong discharge books and Hong Kong and Australian seaman's identity cards) consisted of identification papers located in the files at the immigration office. The record does not make this fact clear. However, even if this were true, we think it not unlikely that their availability may have been dependent upon determining what date and in what place petitioners entered the country

to his questions because of a language barrier, he reached in and took the car keys for the purpose of keeping petitioners on hand until he could find help in communication.

Petitioners press upon us that it was at this point that an arrest without probable cause occurred.[12] The point is not without difficulty, especially since several minutes elapsed before the matter of communication was brought to resolution by the fortuitous appearance of the Chinese student, who was able to talk to petitioners and who reported that they had exceeded their permissible shore leaves. The *Terry* doctrine in terms contemplates that detention for interrogation, as distinct from arrest, will normally be brief in duration,[13] and the reasons why this should be so do not require explication. But the question remains one of the reasonableness of official action under the particular circumstances, and there is no fixed formula as to time, especially when we are dealing with minutes rather than hours. The delay here was occasioned by the efforts made to find a channel of communication to petitioners, not in the time consumed by their questioning once that communication became possible.

We think that the conduct of petitioners prior to and

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[12] They stress also the circumstance that Officer Taylor asked a hospital guard, who happened to be in the vicinity, to keep an eye on the car while he went to find his partner. The testimony of record indicates that the making of this request was not known to petitioners and that they were not aware of the presence of the guard during the five minutes or so that Taylor was away. The guard testified that he was not sure what he would have done if petitioners had tried to leave the car, since Taylor had said nothing about this contingency, although he thought he would probably have endeavored to stop them. The issue, in any event, never arose, since petitioners continued to sit in the car.

[13] The word "briefly" appears in both Justice Harlan's and Justice White's concurrences in *Terry*. 392 U.S. at 33, 34.

upon entering the car, including their vainly seeking to start it, was such as to found a reasonable suspicion about their status within the meaning of the gloss we have hereinabove put on Section 287(a)(1). That being so, Officer Taylor was justified in subjecting petitioners to an investigatory stop for a reasonable period of time. Because of the language barrier, that stop proved longer here than would be necessary in the usual *Terry* criminal context. But different areas of law enforcement have different problems, and legal doctrine common to all must be of sufficient flexibility to accommodate these differences. We are not persuaded that this record presents a picture of official oppression unrelieved by the quality of reasonableness central to the concept of the Fourth Amendment.

We find the deportation orders in both Nos. 23,339 and 23,527 to be valid, and we deny the relief sought in the respective petitions for review.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1970

No. 23,339

[Filed: Mar. 19, 1971]

YI LAU AU, TSZ KI YIM, and SAI TING LAM,
Petitioners

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

Petition for Review of Order of the Immigration & Naturalization Service.

Before: Fahy, Senior Circuit Judge, and McGowan and Leventhal, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Immigration and Naturalization Service, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the Immigration and Naturalization Service on review herein is hereby affirmed.

Per Curiam

For the Court:
/s/ Nathan J. Paulson
Clerk

Dated: March 19, 1971.

Opinion by Circuit Judge McGowan.

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

June 20, 1969

Files: A15 759 505
A15 759 506
A15 759 507 - Washington, D.C.

In re: *AU* YI LAU
YIM TSZ KI
LAM SAI TING

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: March 13, 1969

On behalf of respondents: David Carliner, Esquire
902 Warner Building
Washington, D.C. 20004

On behalf of I&N Service: Irving A. Appleman
Appellate Trial Attorney

CHARGES:

Order: (Au) Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—In United States in violation of law, entered after being refused permission to land as crewman

(Yim and Lam) Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Crewman, remained longer

Lodged: None

APPLICATION: Termination of proceedings

The special inquiry officer ordered the respondents deported on the charge which relates to each. They appeal on the ground that the evidence to establish deportability

was obtained after an illegal arrest and search. The appeals will be dismissed.

The claim that there was an illegal arrest and search requires a presentation of the facts in detail. Except for one matter there is little conflict as to the facts.

Service investigators, believing that one or more Chinese aliens illegally in the United States were employed in a restaurant located in a hotel building, decided to enter the restaurant to question the employees as to whether they were aliens illegally in the United States. They had gone to the same restaurant for the same purpose on two or three occasions in the past year. They did not have a warrant of arrest.[1]

About 5:30 p.m. on October 31, 1967, eight or nine Service investigators went to the hotel building. They were Burns, Podrasky, Taylor, Lamoreaux, Kelley, Stephanadis, Smith and one or two more (p. R-18). With the permission of the hotel employee stationed there, Kelley and Lamoreaux entered the hotel by a side or rear door. Kelley remained near the door. He had a view of some hallways. He would have stopped anyone who tried to leave hurriedly. Lamoreaux, traveling through the hallways of the hotel, made his way to a restaurant room which had a door on a hallway. The door was open, Lamoreaux stationed himself in the hallway so that he could see into the room (pp. R-19, R-21, R-60, R-62). Burns, Podrasky and Taylor entered the restaurant by the front door. The disposition of the other investigators is not shown. The three who entered by the front door approached Park, the assistant manager, who was in charge. Burns and Podrasky identified themselves and carried on the conversation. Taylor took no

[1]The District Director has discretionary authority to issue an administrative warrant for the arrest of an alien, if he determines that the arrest is necessary or desirable. 8 C.F.R. 242.2(a). Ordinarily, the District Director does not issue a warrant of arrest until after the alien has been questioned and it is determined that a prima facie case of deportability exists.

part of the conversation (pp. 20-21, R-4). They were interrupted briefly when Park received a phone call. There is a conflict in the evidence as to what happened next. Park testified that Podrasky identified himself but did not ask for permission to go to the kitchen; that while he was on the phone, Podrasky said that he was from the Immigration Service and he had to go into the restaurant and question the employees; that Podrasky went on without waiting for permission; that as soon as he had hung up the phone, he dashed after Podrasky and offered to set up a small table in the dining room, to which he would send the employees whom Podrasky wanted to see; that Podrasky did not answer, but asked for the direction of the kitchen; that he pointed out the direction; and that he did not tell Podrasky he could not go into the kitchen (pp. 39-43, 47-49). The investigators, on the other hand, testified that after Park hung up, they told him that they wished to talk to the employees, and that Park gave permission to go to the kitchen to talk to the employees (pp. 20-21, 31, R-2-R-4, R-47, R-70, R-72-R-73, R-75). Podrasky testified he could not recall Park offering to bring the kitchen employees to the dining room so that he could talk to them.

In any event, on the way to the kitchen, Burns stopped to talk to an employee. He saw a Chinese person, garbed in a kitchen worker outfit, running toward the front door. He ran after, stopped him at the door, identified himself, and invited him to come to the kitchen to talk. This person is respondent, Yim Tsz Ki (pp. 21-23, R-4-R-5). As Burns and Yim were going to the kitchen, a second Chinese person, dressed like the first, headed for the front door. Burns stopped him and also invited him to come to the kitchen. This person is respondent, Lam Sai Ting (pp. R-5, R-8). On the way to the kitchen, Burns and the two employees passed a room being remodeled to provide additional dining space. A door of this room led to the hallway of the hotel. Lamoreaux was standing in the hallway at the door. Lam ran for the door. Burns followed. Lamoreaux

intercepted Lam. He found Lam could speak no English, but did learn that he was off a ship. He apparently determined at this time to take Lam into custody. All went to the locker room. There, Lam again admitted to Lamoreaux that he had jumped ship. Yim admitted to Burns that he had jumped ship. Burns considered the admission a sufficient basis for detaining Yim. (pp. 22-24, 28, R-7-R-9, R. 14-R16, R-26-R-27).

Taylor and Podrasky had gone on to the kitchen. They questioned employees there. Taylor noticed that an employee walked to the rear of the kitchen, where a door led to the hallway of the hotel. The employee spoke to two Chinese employees who were preparing food for their own consumption. They dropped their food and ran out through the rear exit. No inspector was stationed there. Taylor ran after them. They went in different directions. One was out of sight; he was not apprehended. Taylor caught up with the other, stopped him by taking his arm, and asked him to return to the kitchen. He did not hold him as they walked back. The chase took him past Kelley, standing off the hallway in which the chase took place. Kelley took no part in the chase. The third person is respondent, Au Yi Lau. In the kitchen, with the help of an employee, Taylor learned that Au had come off a ship and had something in the locker room which might help to identify him. He walked Au to the locker room and left him with Burns and Lamoreaux, telling them that Au appeared to be a crewman, that he had tried to run, and that he might have something in the locker. Taylor returned to the kitchen to continue questioning the other employees (pp. R-70-R-74, R-77-R-79, R-81-R-82).

De Lucian, the kitchen supervisor, testified that when the investigators entered, he turned his back on them thinking they were part of the management staff, that suddenly he saw employees taken out to the locker room through the rear exit, that the investigator had come through the rear door, and that he had not been approached for permission to question the employees. He testified that he made himself understood to the respondents in broken English.

Park had testified that respondents could speak no English: he made himself understood by writing Chinese characters.

The one illegal alien, known by name, who the Service thought was working in the restaurant, was not found and is still the object of search (pp. R-51-R-52).

The investigators took the three respondents to the office of the Immigration Service. There, friends came to visit them (pp. 27, R-10). Fingerprints were taken (p. 12). Translators were obtained and statements taken: Kelley took Yim's (Ex. 2), Lamoreaux took Lam's (Ex. 2), Burns took Au's (Ex. 4) (pp. 16-17, 25-27, R-10, R-27-R-29, R-32-R-44, R-52-R-56, R-58-R-59, R-63-R-66). At the Service office, warrants of arrest were issued and served about two hours after the aliens were located (p. 14).

An investigation at the same place subsequent to the one in question, resulted in the apprehension of other aliens illegally in the United States (p. R-67).

Deportation hearings were started on November 1, 1967. At the hearings, which were consolidated, the respondents remained mute. The Service introduced the statements made by the respondents. The investigators who took the statements and an interpreter testified as to the taking of the statements and as to their belief that they represented what the aliens had stated. As to each alien, the Service introduced a seaman identity book and a seaman discharge book (Yim, Ex. R-1; Lam, Ex. R-3; Au, Ex. R-2); and crewman landing certificates (Yim, Ex. 4; Lam, Ex. 3; Au, Ex. 2). A certificate of vaccination was also introduced for Yim. The respective identity and discharge books contain photographs which the special inquiry officer found to be good likenesses of the respondents. Counsel does not believe the likenesses exist (pp. R-6-R-7, R-11, R-30).

If the evidence presented by the Service is competent, it establishes the respondents are deportable aliens. See *Shing Hang Tsui v. INS*, 389 F.2d 994 (7 Cir. 1968). The statements of the respondents alone establish that they are

aliens illegally in the United States.[2] Apart from the statements, the landing certificates establish alienage and the illegality of stay. The seaman's books establish identity of the respondents. There must also be considered the presumption that the alien in deportation proceedings, who has failed to show the manner of his entry, is in the United States in violation of law. *Ah Chiu Pang v. INS*, 368 F.2d 637 (3 Cir. 1966) cert. denied 386 U.S. 1037.

Counsel contends the evidence presented by the Service cannot be used because it was illegally obtained since Park's testimony reveals that the investigators were not given permission to enter the premises to conduct a "search" and since the Service had no right to approach at least the alien in the kitchen. He contends the testimony of Park should be credited rather than the testimony of the investigators because Park is a disinterested witness, but it is in the interests of the investigators to show they were performing their duties. He also contends the Service must establish that permission was granted by evidence that is clear, convincing and unequivocal. The appellate trial attorney emphasizes that Park's own testimony reveals both that he consented to the investigators talking to the employees and that he did not deny the investigators the right to go to the kitchen. The appellate trial attorney also relies upon

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[2]The statements reveal the following: Yim, a 33-year-old native of China, admitted as a crewman on June 21, 1963, (a typographical error: 1967 was obviously meant) deserted the ship at Baltimore on July 7, 1967. Lam, a 42-year-old native and citizen of China, admitted as a crewman about July 12, 1967, deserted his ship about July 15, 1967. Au, a 48-year-old native and citizen of China, after being refused permission as a crewman, deserted his ship on July 12, 1967. We have carefully examined the record as to the manner of taking of the statements. We find the statements were made by respondents with full knowledge of their constitutional rights to remain silent and to consult with attorneys, that there was no element of duress, and that the interpretation was properly made. None of the aliens testified that the statements are inaccurate in any material matter.

the corroboration found in the testimony of the Service investigators.

It is undisputed that the investigators had permission to be in the restaurant. The only issue is whether they had permission to go to the kitchen. We believe the Service has established that Park gave the investigators permission to speak to employees of the restaurant at their jobs and that he made no exception as to the employees who were in the kitchen. The investigators who were with Park are of the belief that he granted them permission to question the employees in the kitchen. Podrasky testified that he could recall no offer to bring the aliens out of the kitchen; and that he was invited into the kitchen (p. R-51). Taylor was of the belief that Podrasky had received permission to go to the kitchen (p. E-75). Burns testified that Podrasky asked Park for permission to speak to the employees and that in response, Park led the way to the kitchen (pp. R-3-R-5). The special inquiry officer, who observed the witnesses testify, resolved the conflict in favor of the Service. We see no reason on this record for reversing his finding.

Moreover, no respondent was approached in the kitchen. Two respondents, Yim and Lam, were approached in the restaurant—no issue is raised about Park granting the Service permission to talk to the employees there. Au was approached in the public hallway of the hotel where permission to enter, if it was needed, was obtained when the hotel employee stationed at the door permitted the Service investigators to enter with knowledge of their employment. (See *Peters v. New York*, 18 N.Y.2d 238, 273 N.Y.S.2d 217, 219 N.E.2d 595, hallway in apartment house a public place.)

While we have considered the question of permission—and we believe that Service employees should ask for permission as a matter of practice—the fact is that law enforcement officers are not required to obtain permission to enter a public place, like a restaurant, to question people there.

Amaya v. United States, 247 F.2d 947 (9 Cir. 1957) cert. denied 355 U.S. 916. See *Terry v. Ohio*, 392 U.S. 1, 34 (White, J., concurring); *Green v. United States*, 259 F.2d 180 (D.C. Cir. 1958) cert. denied 359 U.S. 917 (1959). Furthermore, the power of an immigration employee to question appears to be even broader than that possessed generally by law enforcement officers. Section 287(a)(1) of the Act (8 U.S.C. 1357(a)(1)) provides as follows:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

Under this statute, it would appear no independent evidence of alienage is needed to approach a person. If independent evidence is needed, it can be found in the reasonable suspicion that a person is an alien. A suspicion can be a reasonable one if no more appears than that the person approached is in an area in which illegal aliens are found. *United States v. Montez-Hernandez*, 291 F. Supp. 712, 714-15 (E.D. Cal. 1968). See *Abel v. United States*, 362 U.S. 217 (1960); *Yam Sang Kwai v. INS*, No. 21,784 (D.C. Cir. February 17, 1969), petition for certiorari pending, No. 1220, October Term, 1968; *Amaya v. United States*, supra; *Matter of Wong and Chan*, Interim Decision 1941 (BIA 1968); *Matter of Doo*, Interim Decision 1911 (BIA 1968); *Matter of Chen*, Interim Decision 1833 (BIA 1968).

Considering the facts of the instant case in light of the precedents we hold that it was proper to question the respondents and it was proper to arrest them. Evidence, if any, obtained as the result of the arrest was incident to a lawful arrest and was therefore competent.[3] We shall develop these matters further.

[3]Whether any evidence was obtained from the respondents at the time of the arrest at the restaurant is not clear (See p. R-27). If anything was obtained, it is not shown that it was not voluntarily produced. No respondent has alleged that anything was taken from him.

[continued]

It was proper to question respondents. The posting of the Service investigators did not constitute an arrest. *Yam Sang Kwai*, supra. The experienced Service investigators had reason to believe that illegal aliens were employed in a restaurant. They entered it to question the employees. They limited their questioning to whether the person was an alien and, if so, whether he was legally in the United States. These were matters within their authority. They did not enter to secure evidence for criminal prosecution. No force was used to enter. No force was used to question the employees. There was no harassment of employee or of management. Interference with business was so limited that the kitchen supervisor thought, at first, that the investigators were part of the management. There was no search of any employee except those who attempted to flee. When the investigators saw persons, obviously of foreign descent, moving to make it impossible for them to be questioned, the investigators acted reasonably in taking steps to detain them for questioning as to their immigration status.[4]

The respondents were properly arrested. When the investigators determined that the respondents were aliens illegally in the United States, it was reasonable to arrest them without a warrant for, clearly, they were aliens who were likely to escape before a warrant could be obtained.

Statements made by respondents after they were arrested could be used at the deportation hearing. *Shing Hang Tsui*, supra. Documents which the respondents apparently left on their ships and which came into the possession of the Service in some undisclosed manner and landing certificates taken from the Service files were properly introduced.

[4]Counsel contends that Burns had no cause to arrest Au merely because Au was progressing toward the front exit and was in an employee's uniform. Counsel believes that it was error to stop Au because if he were attempting to flee, he could have been apprehended by investigators who, counsel alleges, were stationed outside the building. Burns did not arrest Au for running away. He stopped him for questioning. He was authorized to do this. He did not arrest Au until he found that Au was illegally in the United States.

Section 287(a)(2), 8 U.S.C. 1354(a)(2); *Yam Sang Kwai,* supra (concurring opinion).

Since it was reasonable to arrest the respondents, evidence obtained as the result of the arrest, if any was obtained, was incident to a lawful arrest and was therefore competent.

Katz v. United States, 389 U.S. 347 (1967); *Wolf v. Colorado,* 338. U.S. 25 (1949) (overruled, *Mapp v. Ohio,* 367 U.S. 643 (1961)); *Gomez v. Layton,* 394 F.2d 764 (D.C. Cir. 1968) cited by counsel are inapposite. *Katz* concerns eavesdropping by electronic means. It did not involve the right to question a person. *Wolf* concerns evidence admittedly seized illegally. We find no illegality in the obtaining of evidence here. *Gomez* merely held that one claiming an unconstitutional deprivation of liberty of movement was entitled to a judicial hearing on his claim.

ORDER: The appeals are dismissed.

Chairman